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No. 03-637

SUPREME COURT, U.S.
FILED
DEC 30 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NEWDUNN ASSOCIATES, LLP; ORION ASSOCIATES; NORTHWEST CONTRACTORS CORPORATION,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE THE INDUSTRIAL DEVELOPMENT AUTHORITY OF THE CITY OF CHESAPEAKE, VIRGINIA IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether the United States Army Corps of Engineers may, consistent with the Clean Water Act, exercise regulatory jurisdiction over wetlands that are not adjacent or contiguous to open waters, but from which rainwater runoff may occasionally reach navigable waters located miles away through a series of manmade, indirect, ephemeral, and intermittent surface water connections.

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INTEREST OF AMICUS CURIAE[1]

Amicus Industrial Development Authority of the City of Chesapeake, Virginia (the "IDA"), is a governmental entity

1. The Industrial Development Authority of the City of Chesapeake, Virginia, files this brief with the consent of all parties. The letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than Amicus Curiae, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

created by Virginia Code Ann. § 15.2-4903. The IDA was created with the principal purpose being to

> acquire, own, lease, and dispose of properties and make loans to the end that such authorities may be able to promote industry and develop trade by inducing manufacturing, industrial, governmental, nonprofit and commercial enterprises and institutions of higher education to locate in or remain in this Commonwealth . . . , and to vest such authorities with all powers that may be necessary to enable them to accomplish such purposes, which powers shall be exercised for the benefit of the inhabitants of the Commonwealth, either through the increase in commerce, or through the promotion of their safety, health, welfare, convenience or prosperity.

Virginia Code Ann. § 15.2-4901.

The City of Chesapeake has an area of 353 square miles. Much of the undeveloped land in Chesapeake is designated as wetlands. The IDA acknowledges that wetlands adjacent to a navigable water are within the jurisdiction of the Clean Water Act (the "CWA"). However, the IDA is concerned with its wetlands that are not adjacent to a navigable water, which amount to approximately 396 acres.[2] Under the United States Court of Appeals for the Fourth Circuit's decision in *Treacy v. Newdunn Associates, LLP*, 334 F.3d 407 (4th Cir. 2003), the IDA is unable to sell any of its wetlands, even those not adjacent to a navigable water. This has and will continue to cause substantial economic hardship.

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2. A map that details the wetlands of the City of Chesapeake is available upon request by this Court.

An example of this is a parcel of property named South Cavalier Industrial Park: Prior to the passage of the CWA, the IDA purchased property from an estate for the purposes of selling pieces of the land to developers. The IDA entered into a deed of trust that would be paid off as the property was sold. The IDA sold part of the property, which is now a developed industrial park. Whether the remaining property, that is adjacent to the industrial park, will be able to be sold and developed is dependant on this Court's interpretation of the jurisdiction of the CWA.

After the passage of the CWA, the remaining property was delineated as wetlands. The property became a wetland as a result of storm water runoff from the construction of the interchange of interstates 64 and 664. Prior to this construction, and at the time of purchase, this property was not a wetland. This wetland has no foreseeable connection with any navigable water. It is simply a manmade, non-tidal wetland. Nonetheless, using the same theory of jurisdiction as in *Newdunn Associates*, the Corps asserts that the property is subject to the CWA.

There is $300,000 of secured debt from the deed of trust on the remaining property. The only way to pay this debt is by release deed after selling the land. Under the Fourth Circuit's ruling in *Newdunn Associates*, the IDA is unable to sell the land because it is considered wetlands within the jurisdiction of the CWA. At an interest of approximately six percent over twenty years, plus the principal of $300,000, the IDA now has an intolerable debt which it could not have foreseen at the time of purchase.

If Petitioner's Writ of Certiorari is denied, the IDA is concerned that its property rights will continue to be impaired, and economic opportunities for the City of Chesapeake will continue to be compromised because of uncertainty as to the extent of the Corps' jurisdiction. Additionally, if Petitioner's Writ of Certiorari is affirmed, but the opinion by the United States Court of Appeals for the Fourth Circuit is not reversed, the IDA is concerned that its non-tidal wetlands will not be able to be sold or developed, causing a significant, negative economic effect for the City of Chesapeake. As a result, fundamental land use decisions will be made at the federal level rather than by the municipalities and states, as federalism intends.

SUMMARY OF ARGUMENT

The issue in this case is whether the United States Army Corps of Engineers (the "Corps") may assert jurisdiction under the Clean Water Act (the "CWA") over wetlands that are not adjacent or contiguous to navigable, open waters. The United States Court of Appeals for the Fourth Circuit expanded the jurisdiction of the Corps to include wetlands in which rainwater runoff may occasionally reach navigable waters located miles away through a series of manmade, indirect, ephemeral, and intermittent surface water connections. *See Treacy v. Newdunn Associates, LLP*, 334 F.3d 407 (4th Cir. 2003). The IDA asserts that the Fourth Circuit has incorrectly expanded the jurisdiction of the Corps under the CWA, and asks this Court to reverse the Fourth Circuit's ruling.

Prior to the Fourth Circuit's ruling, and since the enactment of the CWA, the Corps has been drafting regulations that gradually increased their jurisdiction.

According to the current regulations of the Corps, the Corps has virtually limitless jurisdiction under the CWA. *See, e.g.*, 51 Fed. Reg. 41,217 (1986) (The Corps reserves the right on a case-by-case basis to determine whether a particular waterbody is a water of the United States); EPA & Corps, *Guidance for Asserting Federal Jurisdiction Over Isolated Wetlands in Response to U.S. Supreme Court Decision in SWANCC Case* (Jan. 10, 2003) ("Corps 2003 Guidance") (No meaningful guidelines for an appropriate case-by-case review). This was not the intent of Congress when it passed the CWA.

Congress limited the Corps jurisdiction to "navigable waters", 33 U.S.C. § 1344(a) (2002) and "waters of the United States." *Id.* § 1362(7) (2002). It is highly unlikely that Congress intended such objects as manmade drainage and irrigation ditches to be within the jurisdiction of the Corps under the CWA. The Corps has exceeded the jurisdiction given to it by Congress in asserting jurisdiction over wetlands that are not adjacent to navigable waters.

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (SWANCC), 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001), this Court limited the jurisdiction of the Corps under the CWA to bodies of water that were actually navigable or that were adjacent to open bodies of water. 531 U.S. at 167-68.

The Fifth Circuit correctly read *SWANCC* as a substantial limit to CWA jurisdiction. *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001). Based on its interpretation of *SWANCC*, the Fifth Circuit held that a small seasonal creek and intermittent streams that only infrequently contained running water were not sufficiently linked to navigable waters

in order to be within the jurisdiction of the CWA. *Id.* at 270-71. More recently, the Fifth Circuit put itself squarely in conflict with the Fourth and Sixth Circuits with its decision in *United States v. Needham*, 2003 U.S. App. LEXIS 25318 (5th Cir. 2003). The court made clear that, based on *SWANCC*, a tributary must itself be navigable or truly adjacent to a navigable water to be within the jurisdiction of the CWA. *Id.*

Unfortunately, several circuits, including the Fourth Circuit, failed to interpret *SWANCC* properly. The Fourth Circuit read *SWANCC* to hold that the case applied only to isolated waters, and thus would permit continued CWA jurisdiction over all waters which have at least a minimal hydrological connection to navigable waters. *Newdunn*, 344 F.3d at 417. In accordance with this interpretation, the Fourth Circuit held that wetlands that were connected to a navigable water by multiple drainage ditches, a culvert under a highway, and miles of non-navigable water, were within the jurisdiction of the Corps. *Id.*

The IDA believes that the Fifth Circuit's interpretation of this Court's decision in *SWANCC* is the correct interpretation. The Fourth Circuit's reading of *SWANCC* expands the jurisdiction of the CWA to a point that Congress and this Court had no intention of sending it. The IDA asks this Court to reverse the decision of the Fourth Circuit.

ARGUMENT

I. The United States Army Corps of Engineers has given itself limitless jurisdiction under the Clean Water Act, which Congress did not intend.

Congress passed the Clean Water Act (CWA) for the stated purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2002). The CWA was the culmination of a series of legislative measures passed in response to the problem of heavily polluted waters throughout the country, typified by a 1969 fire on the Cuyahoga River in Cleveland caused by a slick of industrial waste. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174-75, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) (Stevens, J., dissenting).

Section 404(a) of the CWA grants the United States Army Corps of Engineers (the "Corps") authority to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) (2002). The statute defines the term "navigable waters" as "waters of the United States, including the territorial seas." *Id.* § 1362(7) (2002). However, the statute does not define "waters of the United States." Therefore, the Corps promulgated the following regulations to interpret the meaning of "waters of the United States" under the CWA:

> (a) The term 'waters of the United States' means
>
> > (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign

commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

> (6) The territorial seas;
>
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

33 C.F.R. § 328.3(a) (2002).

The IDA does not disagree that any wetlands adjacent to waters that are protected by the CWA are also protected. However, the IDA asserts that wetlands that are not adjacent or contiguous to open waters are not within the jurisdiction of the CWA. The IDA further asserts that manmade drainage or irrigation ditches are not tributaries under the CWA.

The Corps defines "adjacent" to mean "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. § 328.3(c).

The Corps' regulations do not define the term "tributary."[3] However, the Corps, in its regulations, explained

3. Though a "tributary" is not defined by the CWA, a "point source" is. A point source is a place by which, in some instances, parties are allowed to discharge pollutants into navigable waters. A "point source" is defined under the CWA as:

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel

(Cont'd)

that a manmade ditch is subject to the Corps' jurisdiction only if it extends the ordinary high-water mark of an existing water of the United States. 65 Fed. Reg. 12824-825 (2000). The Corps also states that drainage ditches constructed entirely in upland areas *generally* are not considered to be waters of the United States, *Id.* emphasis added, but the Corps reserves the right on a case-by-case basis to determine whether a particular waterbody [i.e. a ditch] is a water of the United States. 51 Fed. Reg. 41,217 (1986). The Corps provides no meaningful guidelines on the appropriate basis for a case-by-case review. See EPA & Corps, *Guidance for Asserting Federal Jurisdiction Over Isolated Wetlands in Response to U.S. Supreme Court Decision in SWANCC Case* (Jan. 10, 2003) ("Corps 2003 Guidance").

This absence of meaningful guidelines means that the Corps has the power to assert limitless jurisdiction. On a case-by-case basis, the Corps may find a way to assert jurisdiction over any object that carries water, no matter how remote or intermittent, so long as at some point, that water has even a chance of meeting with a traditional navigable water.

(Cont'd)

> or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14). This definition is to be broadly interpreted. *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 118 (E.D.N.Y. 2001).

Therefore, by definition, pipes, ditches and conduits are not tributaries, but instead are point sources.

It is unlikely that Congress intended to give the Corps limitless jurisdiction when it passed the CWA. If Congress intended the Corps' jurisdiction to be limitless, it would not have limited the Corps' jurisdiction to "navigable waters" or "waters of the United States." The Corps has exceeded the jurisdiction given to it by Congress in asserting jurisdiction over wetlands that are not adjacent to navigable waters and in identifying manmade drainage and irrigation ditches as tributaries.

II. This Court has limited the Corps' jurisdiction under the Clean Water Act to wetlands that are adjacent to an open body of navigable water.

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985), this Court interpreted the CWA and the Corps' corresponding regulations, holding that the Corps had § 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway. Therefore, wetlands which are not themselves navigable bodies of water may nonetheless be regulated under the CWA when they are "inseparably bound up with the 'waters' of the United States." 474 U.S at 134.

However, this Court in *Riverside Bayview* explicitly declined to extend its holding to cases involving wetlands adjacent to non-navigable waters. This Court stated, "[w]e are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water . . . and we do not express any opinion on that question." 474 U.S. at 131 n.8. This is precisely the question the IDA now calls upon this Court to answer.

This Court's most recent decision came in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (SWANCC), 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001), in which this Court limited the scope of the CWA. *SWANCC* involved several isolated ponds that provided a habitat for migratory birds, but were created from pits that were originally part of a sand and gravel mining operation. 531 U.S. at 163. The Corps invoked the Migratory Bird Rule which states that § 404(a) of the CWA extends to intrastate waters "[w]hich are or would be used as habitat by other migratory birds which cross state lines." *Id.* at 164.

This Court held that federal regulation of the waters at issue under the Migratory Bird Rule exceeded the authority granted to the Corps under the CWA. 531 U.S. at 167. In reaching this conclusion, this Court did not overturn *Riverside Bayview*, but instead reasoned that "[i]t was the *significant nexus* between the wetlands and 'navigable waters' that informed [their] reading of the CWA in *Riverside Bayview Homes*." *Id.* Emphasis added.

Further, under *SWANCC*, it appears that a body of water is subject to the jurisdiction of the Corps under the CWA if the body of water is actually navigable or is adjacent to an open body of water. This Court made that point clear when it stated:

> Indeed we did not 'express any opinion' on the 'question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water'. . . . In order to rule for respondents [the Corps] here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open

> water. But we conclude that the text of the statute will not allow this.

531 U.S. at 167-68.

This court then went on to analyze the meaning of "navigable waters" under the CWA. This Court concluded that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. at 172.

The IDA believes that this Court in *SWANCC* has made it clear that inland, non-contiguous wetlands are outside of the jurisdiction of the Corps under the CWA. Only those wetlands that are adjacent to an open body of navigable water are within the jurisdiction of the Corps.

III. The United States Court of Appeals for the Fourth Circuit interpreted *SWANCC* incorrectly and its decision presently before this Court should be reversed.

In the wake of *SWANCC*, courts have struggled with evaluating the jurisdictional reach of § 404(a) of the CWA. Courts interpreting the scope of *SWANCC* have essentially split into two camps. Under one reading, the *SWANCC* case represents a significant shift in the Court's CWA jurisprudence, calling into question the continuing validity of CWA jurisdiction over waters which are not either actually navigable or directly adjacent to navigable waters. On the other hand, an alternative reading of *SWANCC* holds that

> the case applied only to 'isolated waters,' and thus would permit continued CWA jurisdiction over all waters which have at least a minimal hydrological connection to navigable waters.

F D & P Enterprises v. United States Army Corps of Engineers, 239 F. Supp. 2d 509, 513 (D.N.J. 2003).

The United States Court of Appeals for the Fourth Circuit adopted the latter view in its decision that is now before this Court, *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003). The Fourth Circuit held that inland wetlands remotely connected to a navigable water were within the jurisdiction of the Corps under the CWA. 344 F.3d at 417. The wetlands were connected to the navigable water by multiple drainage ditches, a culvert under a highway, and miles of non-navigable waters. *Id.* The court reasoned that a sufficient nexus existed because there was a hydrological connection from the wetlands to the navigable waters. *Id.*

Further, the Fourth Circuit held that a roadside ditch was a tributary. The Fourth Circuit referred to its holding in *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003). In *Deaton*, the Fourth Circuit held that any branch of a tributary system that eventually flows into a navigable body of water, including a roadside ditch, was within the jurisdiction of the Corps under the CWA. 332 F.3d at 710-11. The Fourth Circuit reasoned that "discharges into nonnavigable tributaries and adjacent wetlands have a substantial effect on water quality in navigable waters." *Id.* at 712.

Other circuits have holdings in accordance with the Fourth Circuit's holdings. *See, e.g., Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533-34 (9th Cir. 2001) (holding

that irrigation canals that had been polluted with herbicide were "navigable waters" because they receive water from natural streams and lakes and divert water to streams and creeks); *United States v. Eidson*, 108 F.3d 1336, 1341-42 (11th Cir. 1997) (tributaries are "waters of the United States" and manmade ditches and canals that flow intermittently into a creek may be tributaries); *United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003) (holding that a "hydrologic connection" existed when a wetland was connected through manmade drains and creeks to navigable waters 11 to 20 miles distant, and was therefore, within the CWA's jurisdiction).

Leading the other side of the debate, the Fifth Circuit has interpreted *SWANCC* to substantially limit CWA jurisdiction, holding that under this Court's reasoning, "a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water." *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001)[4]. Based on this holding, the Fifth Circuit held that a small seasonal creek and intermittent streams that only infrequently contained running water were not sufficiently linked to navigable waters in order to be subject to CWA jurisdiction. *Id.* at 270-71. The Fifth Circuit reasoned that federal authority does not extend to waters or wetlands "that have only an indirect, remote and attenuated connection with an identifiable body of 'navigable waters.'" *Id.* at 272. *See, e.g., F D & P Enterprises v. U.S. Army Corps of Engineers*, 239 F. Supp. 2d at 516-17 (holding that, under *SWANCC*, a "significant nexus" to a navigable water must constitute more than a mere "hydrological connection").

4. In *Rice*, the Fifth Circuit was interpreting the Oil Pollution Act, 33 U.S.C. § 2701 (the "OPA"). 250 F.3d at 266. The Fifth Circuit noted that the OPA and the CWA contained the same definition of navigable waters, which should be interpreted the same way. *Id.* at 267.

The Fifth Circuit eliminated any argument about its split with the Fourth and Fifth circuit when it announced in *United States v. Needham*, 2003 U.S. App. LEXIS 25318 (5th Cir. 2003), that the Fourth and Fifth Circuit's definition of navigable waters was "unsustainable under *SWANCC*." *Id.* The Fifth Circuit held that "in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* 'a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water.'" *Id.* The court reasoned that the CWA was "not so broad as to permit the federal government to impose regulations over 'tributaries' that [were] neither themselves navigable nor truly adjacent to navigable waters." *Id.*

The district court, in *United States v. Newdunn Associates, LLP*, 195 F. Supp. 2d 751 (E.D. Va. 2002), found the wetlands on Newdunn's property to have only an occasional, manmade, indirect, remote and attenuated connection with a body of navigable water. *Id.* at 758. The Fourth Circuit did not contradict this finding. If Newdunn's property were located in the Fifth Circuit, the district court's opinion would have been affirmed. However, the Fourth Circuit held this indirect, manmade, and occasional nexus to be sufficient. The IDA believes that the Fifth Circuit read this Court's decision in *SWANCC* correctly. The Fourth Circuit's reading of *SWANCC* expands the jurisdiction of the CWA far beyond anything this Court or Congress could have conceived of. For this reason, the IDA asks this Court to reverse the decision of the Fourth Circuit.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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